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SHIFTING GEER APRIL 2014

29 APRIL 2014

Welcome to Shifting Geer, Thomson Geer's superannuation newsletter for the period 24 March 2014 - 24 April 2014

APRA AND ASIC UPDATES

APRA minor amendments to Superannuation Reporting Standards

(25 March 2014)

APRA has made minor amendments to the following six reporting standards, largely with respect to the reporting instructions, as follows:

- Reporting Standard SRS 320.0 *Statement of Financial Position*:
  - additional detail about the reporting of hybrid members' benefits;
  - clarity on reporting liability for pooled superannuation trust members' benefits; and
  - clarity on reporting directly held derivatives and the reconciliation with other forms;
- Reporting Standard SRS 330.0 *Statement of Financial Performance*:
  - confirmation that investment income and investment expenses should be reported on a gross basis (i.e. not netted off against each other);
  - additional detail to clarify reporting on fee rebates;
  - clarity about the treatment of lump sum benefit payments and insurance related inflows; and
  - consistency between the instructions and the form, including correction of a derivation calculation;
- Reporting Standard SRS 520.0 *Responsible Persons Information*:
  - correction of cross-references to the relevant paragraphs in SPS 520 Fit and Proper;
- Reporting Standard SRS 530.1 *Investments and Investment Flows*:
  - improvements to definitions such as look-through, private equity investments and the domicile for assets and investment vehicles;
  - further detail about reporting currency hedging ratios and the market exposure of indirectly held derivatives; and
  - improvement to the collection of life insurance company related investments through corrections to definitions;
- Reporting Standard SRS 533.0 *Asset Allocation*:
  - minor change to the D2A form to ensure consistent reporting about

the level of strategic and actual currency hedging under SRS 530.1 and SRS 533.0;

- further detail about reporting currency hedging ratios and the market exposure of indirectly held derivatives;
- improvements to definitions such as look-through, private equity investments and the domicile for assets and investment vehicles; and
- improvement to the collection of life insurance company related investments through corrections to definitions; and

- Reporting Standard SRS 702.0 *Investment Performance*:
  - clarity regarding look-through reporting in the context of reporting investment fees and costs, as well as reporting gross of tax; and
  - clarity regarding reporting on MySuper investment options that start on a date other than the first day of the reporting year (usually 1 July), and collection of the actual start date on the form.

APRA confirms that the amendments have either been previously communicated to the superannuation industry through FAQs or are of a minor nature. The relevant FAQs will be archived on the APRA website with a note to indicate that the content has been included in the latest version of the relevant reporting standard.

The revised reporting standards take effect from 1 April 2014, which means that trustees will be required to comply with these revised reporting standards in respect of reporting periods ending on or after 30 June 2014.

APRA also proposes that SRS 533.0 and SRS 702.0 will only apply to MySuper investment options and intends to amend Reporting Standard SRS 001.0 Profile and Structure (Baseline) (SRS 001.0) to clarify issues in the form and instructions that have been reported to APRA since the form commenced in April 2013. Changes to SRS 001.0 will be communicated prior to the next annual submission date of 30 June 2014.

ASIC Submission to the 2014 Financial System Inquiry
(8 April 2014)

ASIC released its 273 page submission to the Murray Inquiry outlining the following issues for further consideration by the Inquiry:

- ensuring the superannuation system better meets the needs of the retirement phase;
- lifting standards in financial advice;
- strategic participation in global financial markets;
- managing systemic risk;
- improving conduct through a more flexible regulatory toolkit;
- ensuring that regulatory decision making better incorporates competition considerations;
- penalties that provide the incentive for better conduct; and
- a better funding model for ASIC.

The Submission is available both on ASIC's and the Murray Inquiry's website.

LEGISLATION

Freeze on FOFA

(24 March 2014)

Acting Assistant Treasurer Senator Mathias Cormann confirmed that because further amendments to the *Corporations Act's* Future of Financial Advice provisions have been referred to the Senate Economics Committee the Government has decided to pause the implementation of these amendments.

Thomson Geer Comment: *As we have previously stated, ASIC has stated that it is taking a facilitative approach to the FOFA reforms until mid-2014. This means that ASIC will still take enforcement action where it sees deliberate breaches of the new requirements or failure to make reasonable efforts to comply. However, ASIC will not take enforcement action in relation to the specific FOFA provisions that the Government is planning to repeal. ASIC states, for example, that it will not take action for breaches of the fee disclosure statement requirements in respect of retail clients with ongoing fee arrangements entered into before 1 July 2013.*

ASIC will review and consult on its regulatory guides on FOFA once the proposed amendments have been made.

Superannuation Industry (Supervision) modification declaration No 1 of 2014

(registered 10 April 2014)

The Modification Declaration amends SIS Regulation 4.07E in order to permit self-insuring defined benefit funds and sub-funds to continue their self-insurance arrangements beyond 1 July 2016. The Modification Declaration will apply where a superannuation fund has been permitted to self-insure defined benefit members, and those members are transferred on a successor fund basis to a second or subsequent superannuation fund.

Subject to APRA approval and amendments to the successor fund trustee's RSE Licence permitting self-insurance, trustees will be allowed to accept a successor fund transfer of members of self-insuring defined benefit funds.

Thomson Geer Comment: *We have previously acted for successor fund trustees in seeking such amendments to RSE Licences in similar circumstances. It is worth noting that, whilst the application is relatively simple, trustees need to ensure that their RSE Licence amendments take into consideration any further exemptions that may be required from the SIS Regulations, including but not limited to exemptions permitting the transfer of less than 50 defined benefit members.*

CASES

Dominic B Fishing Pty Ltd and Commissioner of Taxation [2014] AATA 205

(10 April 2014)

The Administrative Appeals Tribunal decided that the crew members of a commercial fishing vessel were not employees for the purposes of section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

Section 12(3) states that '*if a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract*'.

The Facts

The taxpayer operated a commercial fishing vessel which was usually captained by the director of the taxpayer. The captain would be joined on

each voyage by up to four crew members who were typically experienced fishermen. The crew members were engaged for each voyage.

While it was at sea, the vessel would anchor at a central spot each day and the fishermen would each board a small motorised boat that would head off to remote locations where the crew members would spend all or part of the day fishing, before returning to the vessel to offload the fish caught that day.

The taxpayer would pay the individual fisherman under the terms of the separate agreement between the taxpayer and each fisherman of which the agreement referred to them as joint venturers.

Decision

The Senior Member noted that the agreement between the parties contemplates them operating as joint venturers – independent business people who are cooperating for the limited purpose of catching and ultimately selling fish. Individual crew members brought their skills and preferred equipment to the venture, and they could exit the arrangement if they wished (albeit there were some practical limits on their ability to leave the boat while it was at sea). The taxpayer provided equipment – most obviously the boat itself – and the skipper and marketing arrangements. But the equipment was effectively placed at the service of the joint venture, to be managed collectively during the voyage for the common end. The crew members, for their part, were free to fish on their own and they were paid for their output. The crew were not integrated into the taxpayer's organisation; each of the parties had a function that they performed individually, albeit cooperatively.

Accordingly, the Senior Member decided that the contract was not wholly or principally for the labour of a crew member, but was a joint venture agreement intended to produce fish for sale. Despite the agreement contemplating the crew members contributing labour, they were remunerated on the basis of an outcome. If there was no outcome – if they did not catch any fish – there would be no remuneration. Indeed, it was theoretically possible under the agreement the crew might return to port owing money to the taxpayer if there were no fish caught on a voyage (although the director acknowledged that had never occurred).

Thomson Geer Comment: *The main point to take from this case is the statement made by the Senior Member that if any party is "looking for authoritative guidance, they will be disappointed. Each case turns on its own peculiar set of facts. One must examine the precise details of the engagement in each case in order to characterise it. Generalisations – whether by the industry and its advisers, or by the Commissioner – are impossible…".*

It is worth noting that ***directors are now personally liable for outstanding superannuation guarantee liabilities*** *(charge percentage, interest and administrative fees). However a defence is available to directors where they can establish that the penalty resulted from the company treating the Act as applying to a matter in a particular way that was reasonably arguable. What this means is that directors must show that their company took reasonable care in connection with applying the Act to the matter. If the company sought legal advice that certain workers were not considered to be employees for superannuation guarantee purposes (and assuming the advice is reasonably arguable) and the ATO or the courts subsequently finds that the workers were actually eligible for superannuation guarantee, then, although the company will remain liable for the superannuation guarantee*

charge, directors will not be personally liable.

OTHER RECENT DEVELOPMENTS

Fair Work Commission 2013 Draft Determinations

(16 April 2014)

In response to its 2013 review of default superannuation funds in modern awards, the Fair Work Commission (**FWC**) released the following Draft Determinations adding the following superannuation funds:

- Air Pilots Award 2010: Aviation Industry Superannuation Trust;
- Aluminium Industry Award 2010: Westscheme;
- Concrete Products Award 2010: Westscheme;
- Hospitality Industry (General) Award 2010: Westscheme;
- Local Government Industry Award 2010: City of Perth Superannuation Fund & Local Super;
- Medical Practitioners Award 2010: Health Super Fund;
- Nursery Award 2010: Westscheme;
- Port Authorities Award 2010: Westscheme;
- Premixed Concrete Award 2010: Westscheme;
- Water Industry Award 2010: City of Perth Superannuation Fund & Local Super.

The FWC is seeking submissions by 5 May 2014.

Thomson Geer Comment: *We note that many of the above mentioned funds no longer exist due to successor fund transfers. We query why the FWC has retained these original names.*

Fair Work Commission Statement

(22 April 2014)

FWC President Justice Iain Ross has confirmed that the 11 March 2014 Directions determining the 2014 review of default fund terms have not changed throughout the process of the FWC forming an Expert Panel.

All applications to the FWC to have a standard MySuper product included on the Default Superannuation List and applications to have an employer MySuper product included on the Schedule of Approved Employer MySuper Products must be lodged with the FWC by Monday, 28 April 2014.

Thomson Geer Comment: *We recommend that if superannuation fund trustees have not already done so, that they ensure their employer and member sponsors, and other relevant third parties, also advocate (if they have not already) on their behalf during the application process where this is permitted in the circumstances.*

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